No. 93-1440

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In The

Supreme Court of the United States

October Term, 1993

THIRD NATIONAL BANK IN NASHVILLE,

Petitioner,

vs.

THE COMMISSIONER OF INSURANCE FOR THE STATE OF LOUISIANA,

Respondent.

On Petition For Writ Of Certiorari To The Louisiana Supreme Court

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

I.

INTRODUCTION

If the facts alleged in respondent's brief were accurate, then without question Louisiana would have had sufficient "minimum contacts" to make constitutionally permissible its exercise of *in personam* jurisdiction over petitioner Third National Bank. To a remarkable degree, however, the Louisiana Commissioner of Insurance has mischaracterized the facts of this case. It is not possible, in a ten-page brief, for Third National Bank to respond to every erroneous assertion in the Commissioner's brief. Petitioner will address only the most significant factual and legal issues and implores the Court to verify the true facts for itself.

II.

THIRD NATIONAL BANK HAD NO DUTY TO MAINTAIN INSURANCE COVERAGE UNDER THE TRUST AGREEMENT

The Commissioner claims that the Insurance Trust Agreement of March 8, 1985 (hereinafter the "Trust Agreement"), imposed two duties upon Third National Bank in addition to those which Third National Bank discussed in its petition: (1) to *maintain* group insurance coverage for the Summit Insurance Plan Trust (hereinafter "Summit"), and (2) to *terminate* the trust if fully insured coverage could not be maintained. *See* **Brief in Opposition at 11**. Neither assertion is remotely correct.

The Commissioner's "duty to maintain" argument is premised solely on a disingenuous misreference, in the first full paragraph of page eleven of respondent's brief, to section 3B of the Trust Agreement. The Commissioner incorrectly argues that the modifying phrase "for the purpose of . . . maintaining the policy . . . in force" imposed an affirmative duty on Third National Bank to make certain that the trust continued to be insured. **Petition at A-48; Brief in Opposition at 7a**. Clearly, this is a grossly unreasonable interpretation of section 3B and of the entire Trust Agreement. Under the unambiguous framework of the Trust Agreement, it is impossible to conclude that Third National Bank had a duty to "maintain" insurance. Clearly, the Bank could not control that variable. In the first instance, no insurer might have been willing to issue a policy. Assuming a policy were issued, the insurer might cancel for any number of permissible reasons beyond the control of the Bank. For these and other reasons, the Trust Agreement does not impose an affirmative duty on the Bank to "maintain insurance coverage," and indeed, acknowledges that the trust terminates "immediately" if and when no coverage exists. *See* **Petition at A-50; Brief in Opposition at 9a**. The imposition of a duty on the part of Third National Bank to "maintain coverage" would not only be inconsistent with the plain terms of the Trust Agreement, but would violate Louisiana's statutory prohibition on the imposition of implied duties on trustees.[1]

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[1] *See* discussion at page 7, *infra*.

III.

THIRD NATIONAL BANK HAD NO DUTY TO TERMINATE THE TRUST AGREEMENT

Similarly, the plain language of the Trust Agreement does not support the Commissioner's argument that Third National Bank had an affirmative duty to terminate the trust in the event Summit's insurance coverage lapsed. The plain language of the pertinent paragraph (section 7B) states that the trust terminates automatically upon lapse of coverage. **Petition at A-50; Brief in Opposition at 9a**. The Commissioner does not and cannot explain how the automatic termination provision can be squared with the alleged affirmative duty upon Third National Bank to terminate the trust upon cancellation of insurance coverage. This argument has no merit.

IV.

THE 1988 MASTER ADMINISTRATIVE AGREEMENT DOES NOT PROVIDE A BASIS FOR EXERCISING PERSONAL JURISDICTION OVER THIRD NATIONAL BANK IN LOUISIANA

The Louisiana Court of Appeal, in reversing the trial court's finding of no minimum contacts over Third National Bank in the state, relied exclusively upon the Trust Agreement for its conclusion that Third National Bank had sufficient minimum contacts with Louisiana. *See Green v. Group Programs*, 622 So. 2d 275 (La. Ct. App. 1st Cir. 1993); **Petition at A-6**. Apparently conceding that the jurisdictional basis relied upon by the Court of Appeal is constitutionally inadequate, the Commissioner's brief focuses largely on the 1988 Master

Administrative Agreement between Group Programs and Summit (hereinafter the "MAA") as an alternative source of "minimum contacts."

Even a cursory reading of the MAA, however, demonstrates it to be an incomplete and ambiguous document that contains no agreement by Third National Bank to do anything. For instance, although it states that it is "by and between Summit Insurance Plan Trust . . . and Group Programs, Incorporated," it subsequently contains agreements by an unidentified and undefined party "the Company." **Brief in Opposition at 13a**. It contains no signature line for either Third National Bank or "the Company," and is purportedly signed only on behalf of Summit Insurance Plan Trust and Group Programs, Inc. *Id.* at 22. Although the Commissioner would like to obliterate the distinction between Third National Bank and the Summit Insurance Plan Trust for the purpose of relying on this document, in fact trust law generally views a trustee and a trust as separate legal entities. Bogert, *Trusts and Trustees*, § 1 n.28 (2d Ed. Rev. 1984). Thus, legally Third National Bank is not even a party to this "Agreement." Accordingly, this document, even if it had any jurisdictional significance, may not be used as a basis for jurisdiction over the Bank.

Additionally, there is no proof in the record that the MAA ever became binding upon those who were parties to it. The MAA states that its purpose is to reflect the rights and obligations of the parties "with respect to the marketing and administration of group insurance plans." **Brief in Opposition at 13a**. It is undisputed that no group insurance plan existed after 1988. Accordingly, the MAA

never became binding upon its parties. *Real Estate Management, Inc. v. Giles*, 41 Tenn. App. 347, 293 S.W.2d 596, 599 (1956); *Zemurray v. Boe*, 235 La. 623, 105 So. 2d 243, 249 (1958); *Work Clothes Rental Serv. Co. v. Dupont Mfrs., Inc.*, 262 So. 2d 807, 809 (La. Ct. App. 1972) (for an agreement to become binding upon the parties, all suspensive conditions or conditions precedent must be met).

Finally, there is no evidence that the execution of the meaningless MAA fostered the continued operation of the uninsured entity which allegedly caused millions of dollars of losses. The Commissioner has never shown that any participant of Summit relied upon the MAA as a basis for assuming that Group Program's rogue operation of this "trust" was legitimate. The only evidence as to the use of the MAA is Patrick Huval's statement that the purpose behind the MAA's execution was a fruitless attempt on his part to obtain insurance coverage after the insurance policy issued by Durham Life Insurance Company (hereinafter "Durham") was cancelled in June 1985. **Brief in Opposition Exhibit 1 at 32-33. (Exhibit Envelope 2)**. Group Programs could and no doubt would have operated Summit as an uninsured entity without the MAA.[2]

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[2] For the record, the Commissioner's suggestion that Third National Bank knowingly assisted Summit's continued operation after insurance coverage had lapsed is flatly untrue. The Bank never received notice of the cancellation of the Durham Life policy. **Petition at A-63.**

V.

THE ACTIONS OF GROUP PROGRAMS DO NOT PROVIDE A BASIS FOR FINDING MINIMUM CONTACTS OVER THIRD NATIONAL BANK

The Commissioner's perhaps most misleading argument is the assertion that Third National Bank took direct actions in Louisiana that give rise to the present claims. All of the actions that actually give rise to a legally assertable claim were actions taken by Group Programs, unilaterally. The Commissioner places enormous significance on the fact that the Summit Insurance Plan Trust was "extremely active" in Louisiana, and its "assets" were physically located in Louisiana. **Brief in Opposition at 19**. These "activities," all taken by Group Programs, and "assets," all controlled exclusively by Group Programs, are not a permissible basis for the assertion of personal jurisdiction over Third National Bank. *Worldwide Volkswagen Corporation v. Woodson*, 444 U.S. 286, 296, 100 S. Ct. 559, 567, 62 L. Ed. 2d 490 (1980). As noted by this Court in *Hanson v. Denckla*, 357 U.S. 235, 254, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958), the issue of personal jurisdiction must be resolved "by considering the acts of the trustee." The Commissioner's arguments in this case ultimately reduce to the "center of gravity" theory expressly rejected in *Hanson*. *Id.*

VI.

LOUISIANA LAW PROHIBITS THE IMPLIED DUTIES THE COMMISSIONER URGES THIS COURT TO RECOGNIZE AS THE BASIS FOR PERSONAL JURISDICTION OVER THIRD NATIONAL BANK

The Commissioner also argues that even though Third National Bank was never notified of the cancellation by Durham of the policy covering Summit, it "should have known" of the cancellation because it had an implied duty to monitor the status of the insurance coverage. **Brief in Opposition at 22-24**. First, there is no legal basis for this argument because Louisiana law prohibits the imposition of implied fiduciary duties on financial institutions. *See* La. R.S. 6:1124 (1991). Second, the Trust Agreement states that Third National Bank shall have "no duty to determine whether the Administrator is properly performing its duties" under the Trust Agreement. **Petition at A-49**; **Brief in Opposition at 7a**. It was the duty of the Administrator to make all decisions "as to purchase, issuance, termination, modification or replacement of such group master policy or policies." *Id.* **at A-49**; **Brief in Opposition at 8a**. Third, such a duty would be inherently impossible to fulfill unless the Bank called the insurance company on at least a daily basis. Finally, since the Trust Agreement imposes no duty on the Bank in the event it learns that coverage has terminated, it would be entirely illogical to infer an implied duty to learn of insurance cancellation.

VII.

HANSON V. DENCKLA IS NOT DISTINGUISHABLE FROM THIS CASE

The Commissioner's attempts to distinguish *Hanson v. Denckla*, 357 U.S. 235, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958), from this case are entirely unpersuasive. Third National Bank had no duty to maintain the group insurance policy obtained, nor to terminate the trust. Instead, as in *Hanson*, Third National Bank had a limited role which did not give rise to significant contacts with the forum state. Certainly, the *facts* in *Hanson* are different from those in the instant case. However, those factual distinctions make *Hanson* even more compelling in its application. Unlike *Hanson*, in which the trustee undertook the traditional trustee's role of administering monetary assets, Third National Bank had an even more limited role: safekeeping an insurance policy, and acting at the direction of the administrator to execute documents designed to maintain insurance coverage. Third National Bank in this instance was one step removed from the traditional trustee's discretionary role, and acted as a custodian with delineated duties. Thus, the fact that Group Programs deposited millions of dollars in bank accounts under the name of the trust, over which Third National Bank had no control, or that it continued to operate Summit after insurance coverage had been cancelled, does not constitute a permissible basis for the exercise of jurisdiction over Third National Bank in Louisiana. *St. Charles Land Trust v. St. Amant*, 253 La. 243, 217 So. 2d 385, 388-89 (1968); *Sternberger v. Glenn*, 175 Tenn. 644, 137 S.W.2d 269, 271 (1940) (in order for property to become trust property, legal title in the property must be

transferred to the trustee). *See also Hanson*, 357 U.S. at 253, 78 S. Ct. at 1239-40 ("the unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the [minimum contacts] requirement" of the Due Process Clause).

It is irrelevant that Third National Bank corresponded with Group Programs in Louisiana and knew that Group Programs was operating primarily in Louisiana, just as it was irrelevant that the trustee in *Hanson* knew that the settlor and many beneficiaries were located in Florida and engaged in regular communications with the settlor in Florida for eight years. The question here is whether Third National Bank purposefully availed itself of the privilege of conducting jurisdictionally significant activities in Louisiana, thus invoking the benefit and protection of its laws. The answer to this question, as the Louisiana trial court correctly decided at the outset of the case, is no.

CONCLUSION

For the reasons set forth above and in its petition, Third National Bank respectfully submits that a writ of certiorari should be granted in this case.

Respectfully submitted,

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